IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 3, 2008

STATE OF TENNESSEE v. HARRY MILES HIGGINS, JR.

Direct Appeal from the Circuit Court for Williamson County
No. I-CR012341 Robbie T. Beal, Judge

No. M2007-02327-CCA-R3-CD - Filed October 31, 2008

The defendant, Harry Miles Higgins, Jr., entered a best interest guilty plea to one count of harassment, a Class A misdemeanor. The trial court sentenced him to eleven months in the county jail, to be served consecutively to a previous sentence for attempted first degree murder. On appeal, the defendant argues that the trial court erred in imposing consecutive sentencing on the basis of facts not proven to a jury beyond a reasonable doubt. Following our review, we affirm the judgment of the trial court but remand for entry of a corrected judgment reflecting that the defendant's sentence is to be served in the county jail rather than the Department of Correction.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed and Remanded for Entry of Corrected Judgment

ALAN E. GLENN, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and D. KELLY THOMAS, JR., J., joined.

Vanessa Pettigrew Bryan, District Public Defender, and James Lee Elkins, III, Assistant Public Defender, for the appellant, Harry Miles Higgins, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; Ronald L. Davis, District Attorney General; and Tammy J. Rettig, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

At the defendant's guilty plea submission hearing, the State summarized the proof it would have presented at trial:

> Judge, if this had gone to trial, the State would show that on August the 5th, 2006, the defendant placed a number of telephone calls to a Ms. Lisa Austin by which he knowingly annoyed or alarmed Ms. Austin with the content of those messages for cause.

At the sentencing hearing, the victim testified that the defendant had dated her daughter. She said she received between twenty and thirty phone calls and several voicemail messages from the defendant. In these messages, the defendant threatened to kill her daughter and said "everyone was going to die." She testified that the calls made her fear for her daughter's safety. The State played for the court an audiotape containing the voicemail messages.

The State introduced copies of prior judgments against the defendant for dealing in stolen property, grand theft auto, attempted aggravated assault, aggravated assault, and attempted first degree murder.

The defendant exercised his right of allocution. He stated that he had a drug problem at the time of the offense and did not remember making the phone calls. He acknowledged that he made several bad decisions and that those decisions have consequences. He apologized to the victim and the court.

The trial court sentenced the defendant to eleven months in the county jail and ordered that the sentence be served consecutively to his sentence for attempted first degree murder:

> With regard to the factors that would determine consecutive sentencing. While the [defendant] does not necessarily have an extensive record in that it's a lengthy record, the record that he does have is extensive in the sense that it is filled with very serious offenses that the Court should not take lightly. And I think the legislature when they wrote; the court should take into consideration the extensive record, I think they're not only applying to the number, but also applying, for lack of a better term, the quality, I guess, of the criminal offenses committed. And this [defendant] has an extensive record in that the offenses that he's committed are significant and should be considered as such.
>
> The [defendant] does have a history of dangerous behavior. It's obvious from the charges that he's accrued today that this [defendant] is a dangerous individual. And had he been around or near the daughter or the mother at the time these phone calls were made, well, I wouldn't doubt for a moment that they would have been in great harm or great danger at that time. And I believe that the Court can properly consider that he engaged in dangerous behavior.
>
> I certainly appreciate the fact that the [defendant] states that he was on drugs at the time and really wasn't using his best judgment, that's obvious to this Court. And, . . ., I don't need to tell this [defendant]. He knows from more personal

experience than I do that this court is full of people that have gotten themselves involved in drugs and commit all types of crimes based on that drug usage. But very rarely is it a sustained violent intent which is obviously occurring in this particular case.

So the fact that he was on drugs, again, I appreciate the significance of that fact in his personal life, but that doesn't excuse his behavior in this case in any way. And the Court does find that the individual is a dangerous individual who needs to be separated from polite society for whatever length the Court can.

Again, coming back to the primary consideration that this Court has and, quite frankly, excluding all the enhancement factors I named and excluding all the other considerations I've named, the mere fact that this type of offense was committed while the [defendant] was on parole is the most significant factor that the Court has to consider.

. . . .

This [defendant], obviously, failed to recognize the significance of the Tennessee Department of Correction's attitude and gesture in this particular case. He obviously chose to ignore this opportunity that the Tennessee Department of Correction gave him. And by so ignoring, then there is no real reason why this Court believes that, again, he should be allowed in polite behavior [sic].

The Court believes that the appropriate sentence in this case is 11 months as I've already stated. I think the State has made an appropriate case that it run consecutive.

[The] Court is going to order that this matter be consecutive to the term you're now serving.

ANALYSIS

The defendant argues that his Sixth Amendment right to a jury trial was violated when the trial court ordered that he serve his sentence consecutively to his previous sentence. Citing Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), he argues that the State was required to prove any facts justifying the imposition of consecutive sentencing to a jury beyond a reasonable doubt. The State argues that Blakely is inapplicable to sentencing determinations involving misdemeanor convictions because there is no presumptive minimum for a misdemeanor sentence. As we will explain, the defendant is not entitled to relief.

When an accused challenges the length, range, or manner of service of a sentence, it is the duty of this court to conduct a *de novo* review on the record with a presumption that "the

determinations made by the court from which the appeal is taken are correct." Tenn. Code Ann. § 40-35-401(d) (2006). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The presumption does not apply to the legal conclusions reached by the trial court in sentencing the accused or to the determinations made by the trial court which are predicated upon uncontroverted facts. State v. Butler, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); State v. Smith, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994); State v. Bonestel, 871 S.W.2d 163, 166 (Tenn. Crim. App. 1993), overruled on other grounds by State v. Hooper, 29 S.W.3d 1, 9 (Tenn. 2000). However, this court is required to give great weight to the trial court's determination of controverted facts as the trial court's determination of these facts is predicated upon the witnesses' demeanor and appearance when testifying.

In conducting a *de novo* review of a sentence, this court must consider (a) any evidence received at the trial and/or sentencing hearing, (b) the presentence report, (c) the principles of sentencing, (d) the arguments of counsel relative to sentencing alternatives, (e) the nature and characteristics of the offense, (f) any mitigating or enhancement factors, (g) any statements made by the accused in his own behalf, and (h) the accused's potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-103, -210 (2006); State v. Taylor, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001). Enhancement factors may be considered only if they are "appropriate for the offense" and "not already an essential element of the offense." Tenn. Code Ann. § 40-35-114 (2006).

The party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401, Sentencing Commission Cmts.; Ashby, 823 S.W.2d at 169. In this case, the defendant has the burden of illustrating the sentence imposed by the trial court is erroneous. If our review reflects that the trial court, following the statutory sentencing procedure, imposed a lawful sentence, after having given due consideration and proper weight to the factors and principles set out under the sentencing law and made findings of fact that are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

A trial court, in its sound discretion, may impose consecutive sentencing in accordance with Tennessee Code Annotated section 40-35-115, if it finds any of the following criteria:

> (1) The defendant is a professional criminal who has knowingly devoted such defendant's life to criminal acts as a major source of livelihood;
>
> (2) The defendant is an offender whose record of criminal activity is extensive;
>
> (3) The defendant is a dangerous mentally abnormal person as declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;

(4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;

(5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;

(6) The defendant is sentenced for an offense committed while on probation; or

(7) The defendant is sentenced for criminal contempt.

These criteria are stated in the alternative; therefore, only one need exist to support the appropriateness of consecutive sentencing.

In Blakely, the petitioner pled guilty to kidnapping his wife. The facts admitted in his plea supported a maximum sentence of fifty-three months. The trial court found that the petitioner had acted with exceptional cruelty and enhanced his sentence to ninety months. Blakely, 542 U.S. at 298, 124 S. Ct. at 2534. On appeal, the petitioner argued that the sentence enhancement violated his Sixth Amendment right to a jury trial. The United States Supreme Court agreed, holding that facts, other than that of a prior conviction, may not be used to enhance a defendant's sentence beyond the prescribed statutory maximum unless proven to a jury beyond a reasonable doubt or admitted by the defendant. Id. at 301, 124 S. Ct. at 2536; see also Apprendi v. New Jersey, 530 U.S. 466, 488, 120 S. Ct. 2348, 2361 (2000). "[T]he 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely, 542 U.S. at 303, 124 S. Ct. at 2537 (emphasis omitted).

In determining that consecutive sentencing was appropriate in the present appeal, the trial court found that the defendant was an offender whose record of criminal activity was extensive and that he committed the offense while on parole. The defendant argues that Blakely required that these facts be proven to a jury beyond a reasonable doubt before they could be used to justify consecutive sentencing. He cites decisions of the Supreme Courts of Ohio and Oregon which have extended Blakely's holding to consecutive sentencing determinations. See State v. Ice, 170 P.3d 1049 (Or. 2007), cert. granted sub nom. Oregon v. Ice, __ U.S. __, 128 S. Ct. 1657 (2008); State v. Foster, 845 N.E.2d 470 (Ohio 2006). However, the Tennessee Supreme Court recently has held that Tennessee's statutory scheme for imposing consecutive sentences does not violate Apprendi and Blakely. State v. Allen, 259 S.W.3d 671 (Tenn. 2008). The court explained:

> Apprendi and Blakely *simply do not* require the jury to determine the manner in which a defendant serves multiple sentences. . . . The manner of service of the sentence imposed when a trial court decides whether to impose consecutive sentences

> - a decision it may make only after the jury has found the defendant guilty of multiple offenses beyond a reasonable doubt - does not usurp the jury's factfinding powers or offend the defendant's due process rights.

Id. at 690 (citation omitted). Accordingly, the defendant's claim is without merit.

We note that the judgment does not specify what percentage of the sentence the defendant shall serve before being eligible for work release, furlough, trusty status, and related rehabilitative programs. If no percentage is expressed in the judgment, then it shall be considered to be zero percent. Tennessee Code Annotated section 40-35-302 (d) provides in relevant part:

> In imposing a misdemeanor sentence, the court shall fix a percentage of the sentence that the defendant shall serve. *After service of such a percentage of the sentence, the defendant shall be eligible for consideration for work release, furlough, trusty status and related rehabilitative programs.* The percentage shall be expressed as zero percent (0%), ten percent (10%), twenty percent (20%), thirty percent (30%), forty percent (40%), fifty percent (50%), sixty percent (60%), seventy percent (70%) but not in excess of seventy-five percent (75%). *If no percentage is expressed in the judgment, the percentage shall be considered zero percent (0%).* When the defendant has served the required percentage, the administrative authority governing the rehabilitative program shall have the authority, in its discretion, to place the defendant in the programs as provided by law.

Tenn. Code Ann. § 40-35-302(d) (2006) (emphasis added).

As we explained in State v. Lauren E. Leslie and Janie Whitehead, No. 03C01-9804-CR-00125, 1999 WL 153773, at *4 (Tenn. Crim. App. Mar. 23, 1999), perm. to appeal denied (Tenn. Sept. 13, 1999):

> After the court sets the entire misdemeanor sentence by fixing a "specific number of months, days or hours" pursuant to section 40-35-302 (b), it sets the percentage of time to be served before the defendant becomes "eligible for consideration" for rehabilitative programs such as work release, furlo[ugh] or trusty status. The actual decision to admit the defendant to such a program is entrusted to the discretion of "the administrative authority governing the rehabilitative program." Tenn. Code Ann. § 40-35-302(d) (1997). The percentage contemplated by subsection (d) does not establish a *per se*, date for release from confinement because release depends upon the future discretionary act of an administrative agency and, in any event, any release is part of a structured "rehabilitative program" and may be only partial or episodic in nature.

Therefore, while the defendant is required to serve his entire eleven-month sentence in the county jail consecutively to his sentence for attempted first degree murder, he will, upon completion

of the attempted first degree murder sentence, be immediately eligible for consideration for work release or other similar programs, pursuant to Tennessee Code Annotated section 40-35-302(d).

CONCLUSION

Based on the foregoing authorities and reasoning, the judgment of the trial court is affirmed. This matter is remanded for entry of a corrected judgment reflecting that the defendant's sentence is to be served in the county jail.

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ALAN E. GLENN, JUDGE